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ABSTRACT

This paper discusses provisions in the reauthorized Individuals with Disabilities Education Act of 1997 that relate to eligibility of students with disabilities, required services, and termination of special education services for students with disabilities who are between ages 18 and 21. It reviews regulations that clarify: (1) when the right to a free appropriate public education ends (when a student graduates with a regular high school diploma, but not if the students receives a certificate of attendance or an alternative diploma); (2) student eligibility; (3) the scope of required special education services required; (4) the right to summer school services; (5) the use of private and public insurance to pay for services only with the parents' informed consent; (6) the requirement that special education include specially designed instruction to meet the unique needs of students; (7) the comprehensive system of personnel development; (8) the consideration of assistive technology for all students as part of the Individualized Education Program (IEP); (9) the requirement that students with disabilities cannot be removed from age-appropriate regular classrooms solely because of needed modifications in the general curriculum; (10) IEP development; (11) private school placements; and (12) the right to continued services when an appeal is filed. (CR)

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Below is an article published by Neighborhood Legal Services, Buffalo, NY for United Cerebral Palsy Associations on the new IDEA. It includes a special section on legal rights related to assistive technology. We hope you will find this information useful and would appreciate any feedback you wish to give us.

PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION
When Does the Right to Special Education Services End?

Part B of IDEA covers students aged 3 through 21. However, for students between the ages of 18 and 21, a state need not provide services if inconsistent with state law. 20 U.S.C. § 1412(a)(1)(B)(i). The new regulations clarify that the right to a free appropriate public education ends when a student graduates with a regular high school diploma. 34 C.F.R. § 300.122(a)(3)(i). This does not include students receiving a certificate of attendance or what is sometimes called the "Individual Education Plan (IEP) Diploma." Id. § 300.122(a)(3)(ii). A special education student's graduation is considered a change of placement, requiring notice and the right to a hearing. Id. § 300.122(a)(3)(iii). However, a reevaluation of the student is not required prior to graduation. Id. at § 300.534(c)(2).

DEFINITION OF DISABILITY

To be eligible for special education services, a student must have of one of several listed disabilities. Id. § 300.7(a)(1). The new regulations add Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder as examples within the definition of other health impaired. Id. § 300.7(c)(9). They also permit a student to be classified as autistic, even if the characteristics of autism are manifested after age three. Id. § 300.7(c)(1)(ii). The new regulations also clarify the eligibility of students advancing from grade to grade. Schools are not relieved of their obligation to these students simply because they are making academic progress. The decision of whether a student is still in need of services is to be made on an individual basis by the IEP Team. 34 C.F.R. § 300.121(e). This is also true for students who have not yet been classified as special education students. Id. § 300.125 (a)(2)(ii).

SCOPE OF SPECIAL EDUCATION SERVICES

IDEA '97 expands the scope of an appropriate education, adding that it should meet students' unique needs and "prepare them for employment and independent living." 20 U.S.C. § 1400 (d)(1)(A). The proposed regulations noted: This change represents a significant shift in the emphasis of [IDEA]-to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education. Federal Register, p. 55029, 10/22/97 (emphasis added). The comments to the final regulations reaffirm this: Therefore, it is correct to state that the 1997 amendments [to IDEA] place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law. Federal Register, p. 12538, 3/12/99.

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THE RIGHT TO SUMMER SCHOOL SERVICES

The new regulations add services during the summer months, called "extended school year (ESY) services." Eligibility must be determined individually and services must be provided, if needed, to ensure a free appropriate public education (FAPE). ESY services cannot be limited to particular categories of disability and schools may not "unilaterally limit the type, amount or duration" of ESY services. 34 C.F.R. § 300.309. The comments to the final regulations note that states are free to establish their own standards, as long as they do not deny ESY services to children who need them to receive a FAPE. Federal Register, p. 12576, 3/12/99. In most cases, a variety of factors may be considered "(e.g., likelihood of regression, slow recoupment, and predictive data based on the opinions of professionals)," "but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor." Id.

A FAMILY'S USE OF PRIVATE INSURANCE

The new regulations authorize the use of private and public insurance to pay for special education services. A school may use parents' private insurance only with the parents' informed consent, each time the school seeks to use their insurance. The school must tell parents that their refusal to consent does not relieve the school of its obligation to provide services. 34 C.F.R. § 300.142(f). The comments add that parents may not be aware of potential future consequences from using their insurance. Accordingly, schools should inform parents of potential consequences, such as exceeding a cap on benefits, and encourage parents to check with their insurance provider before giving consent. Federal Register, p. 12567, 3/12/99. Unlike private insurance, a school is not required by IDEA to obtain advance consent each time it uses a public insurance program, such as Medicaid. But, a school may not require parents to sign up for public insurance. Nor can the school require the parents to use public insurance where there is "financial cost," including: (1) out-of-pocket expenses such as deductibles or co-payments; (2) a decrease in available lifetime coverage; (3) risk of loss of eligibility for home and community-based waiver programs; and (4) an increase in premiums or the discontinuation of the insurance. 34 C.F.R. § 300.142(e). Moreover, as with private insurance, a child's right to a FAPE is not dependent upon whether parents consent to the use of public insurance. Federal Register, p. 12569, 3/12/99. Therefore, if parents refuse to give consent, the school is still responsible for providing the services. Parents must often take a practical approach to the use of private insurance or Medicaid. Even though the law may not mandate the use of outside insurance, it may be easier to resolve issues in dispute if the parents agree to use outside insurance when it is available. Parents must be cautioned, however, particularly with respect to private insurance, that it is important to check with their insurance company to ensure that they are not adversely affected by their decision.

THE CHOICE OF EDUCATIONAL METHODOLOGY

The new regulations add to the definition of special education a definition for "specially designed instruction," which includes "adapting the content, methodology or delivery of instruction" to meet the unique needs of a student with a disability and to ensure access to the general curriculum. 34 C.F.R. § 300.26(b)(3)(emphasis added). The comments explain its importance:

[T]here are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy. Federal Register, p. 12552, 3/1/2/99. Instructional methodology does not need to be addressed in the IEPs of students not needing a particular methodology to receive educational benefit. In all cases, the IEP Team decides whether to address methodology in the IEP. Id.

The IEP Team must consider the use of Braille for blind and visually impaired students and the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students. 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2). If the IEP Team determines that a student who is deaf needs a sign language interpreter in order to participate in the general curriculum, those needs must be addressed in the IEP. Id. Part 300, App. A, Quest. 2.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

The United States Supreme Court recently observed that "IDEA requires school districts to hire specially trained personnel to meet a student's needs." Cedar Rapids Community Sch. Dist. v. Garret F., ___ U.S. ___, 119 S.Ct. 992, 999, fn.8 (1999). As part of its comprehensive system of personnel development, states must have a system to ensure sufficient personnel to meet the needs of its students with disabilities. 34 C.F.R. § 300.135. The comments to the new regulations note "each State must have a mechanism for serving children with disabilities if instructional needs exceed available (qualified) personnel, including addressing those shortages in its comprehensive system of personnel development if the shortages continue." Federal Register, p. 12408, 3/12/99, regarding 34 C.F.R. § 300.136(g)(3).

ASSISTIVE TECHNOLOGY

The need for AT must now be considered for all students when developing the IEP. 20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.346(a)(2)(v). The comments to the new regulations state that it is "mandatory for the IEP team to consider each child's AT needs." In doing so, however, the school is not required to document in writing its consideration of AT for each student. The decision about AT must be made when the IEP for the upcoming school year is finalized so the AT can be implemented at the beginning of the year. Federal Register, pp. 12590-91, 3/12/99. AT encompasses the student's own personal needs for AT, as well as access to AT devices used by all students. If a student needs accommodations to use an AT device used by all students, the school "must ensure that the necessary accommodation is provided." Id., p. 12540. The comments give examples of covered AT devices, such as captioning, computer software, FM systems and hearing aids for students with hearing impairments. Other examples of AT devices include electronic notetakers, cassette recorders, word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print. Id., pp. 12540, 12575. Orientation and mobility and travel training were added to the definition of related services. 20 U.S.C. § 1401(22); 34 C.F.R. §§ 300.24(b)(6) and

300.26(a)(1)(ii). Both services may be provided to teach students to move effectively and safely within the school, home and community.

The new regulations emphasize the use of AT to allow students with disabilities to be transported with nondisabled peers:

For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles. Id. Part 300, App. A, Quest. 33 (emphasis added).

The comments assume most children with disabilities will receive the same transportation as non-disabled children. If the child needs transportation to receive a FAPE or needs "accommodations or modifications to participate in integrated transportation with non-disabled children, the child must receive the necessary transportation or accommodations." Federal Register, p. 12551, 3/12/99 (emphasis added). The definition of AT services includes training for the student with a disability, as well as the family, if appropriate. 34 C.F.R. § 300.6(e). The new regulations add to the definition of "parent counseling and training": "helping parents to acquire the necessary skills that will enable them to support implementation of their child's IEP." Id. § 300.24(b)(7)(iii). The comments note this change is consistent with "the more active role acknowledged for parents" by IDEA '97. Federal Register, p. 12549, 3/12/99.

The new regulations also adopt several U.S. Department of Education, Office of Special Education Programs (OSEP) policies on using AT. They indicate schools may be responsible for providing AT in the home, or in other settings, if the IEP Team determines, on a case-by-case basis, the student will need AT in that setting to receive a FAPE. 34 C.F.R. § 300.308(b). As a corollary, they note that parents cannot be charged for normal use, and wear and tear, but that state law, not IDEA, will generally govern parent liability for theft, loss, or damage due to negligence or misuse of AT outside of school. Federal Register, p. 12540, 3/12/99. The new regulations also state that although schools are not normally responsible for personal items, such as hearing aids or eyeglasses, if the IEP Team determines that a student needs such a device to receive a FAPE, the school must provide it. Id.

LEAST RESTRICTIVE ENVIRONMENT

The new regulations emphasize that students with disabilities cannot be removed from age-appropriate regular classrooms "solely because of needed modifications in the general curriculum." 34 C.F.R. § 300.552(e). The "general curriculum" is defined as the same curriculum as for non-disabled children. Id. § 300.347(a)(1)(i). Additionally, a student cannot be required to demonstrate a specific level of performance before being considered for regular class placement.

However, the strong preference for placement in regular education does not mean a student must fail in that environment before considering a more restrictive setting. Id., Part 300, App. A, Quest. 1. Placement decisions must be based on the student's needs and

not on such factors as the student's classification, availability of services, "configuration of the service delivery system, availability of space, or administrative convenience." Id.

INDIVIDUALIZED EDUCATION PROGRAM DEVELOPMENT

Developing the IEP begins with a comprehensive, individualized evaluation of the student by the school. If the parents disagree with that evaluation, they may request an independent evaluation at school expense. 34 C.F.R. § 300.502(b). Parents should submit their request prior to obtaining the evaluation, but this is not required. U.S. Dept. of Education, Office of Special Education Programs (OSEP) Policy Letter to Hon. J. Fields, 2 Education for the Handicapped Law Report (EHLR) 213:259 (1989). Pursuant to the new regulations, schools may ask parents to give reasons for their disagreement with the school's evaluation, but cannot require this. 34 C.F.R. § 300.502(b)(4). The school must, without unreasonable delay, either agree to pay for the independent evaluation or initiate a hearing to show its evaluations were appropriate. Id. § 300.502(b)(2).

IDEA '97 strengthened the parents' role in developing their children's IEP. Parents are now members of the IEP Team. Id. § 1414(d)(1)(B). However, parents do not have the right to be present every time school officials discuss their child. The regulations seem to make a distinction between informal discussions about such items as lesson plans and preparatory activities, and decision making about what will actually appear on the IEP. 34 C.F.R. § 300.501(b)(2).

The new regulations also make clear that decisions about the IEP should, as much as possible, be reached by consensus. Taking a vote is not considered an appropriate way to make decisions. Since the ultimate responsibility to provide a FAPE rests with the school, if consensus cannot be reached, the school must make a decision, which the parents have the right to appeal. Id. Part 300, App. A, Quest. 9.

IDEA '97 adds the regular education teacher as a member of the IEP Team for any student who is or may be receiving services in the regular education classroom. 20 U.S.C. § 1414(d)(1)(B). Depending on the student's needs and the purpose of the meeting, the regular education teacher is not required to attend the entire meeting or be at every single IEP Team meeting. The school and parents are encouraged to reach agreement, in advance, concerning the regular education teacher's involvement. 34 C.F.R. Part 300, App. A, Quest. 24. However, it is anticipated that it will be extremely rare for the regular education teacher not to be in attendance. Federal Register, p. 12583, 3/12/99. For students with more than one regular education teacher, the school can determine which teacher attends. The school is strongly encouraged to obtain input from any teachers who will not be attending. 34 C.F.R. Part 300, App. A, Quest. 26. The new regulations also clarify that the school representative on the IEP Team must have the authority to commit school resources and ensure that the services in the IEP will actually be provided. Id., Quest. 22. A copy of the IEP must be accessible to each regular or special education teacher, as well as any others who are responsible for implementing the IEP. Id. § 300.342(b)(2). Additionally, everyone providing services must be informed of their specific responsibilities, as well as the specific accommodations, modifications and

supports for the student. Id. § 300.342(b)(3). The parents must also be given a copy of the IEP, at no charge. Id. at 300.345(f).

PRIVATE SCHOOL PLACEMENTS

IDEA '97 limited the amount school districts must spend on providing services to students enrolled by their parents in private schools. A school must spend a proportionate share of its IDEA dollars for students enrolled in private schools. 20 U.S.C. § 1412(a)(10)(A)(i)(I). However, states "are not prohibited from providing services to private school children with disabilities beyond those required by this part, consistent with State law or local policy." Federal Register, p. 12410, 3/12/99, regarding 34 C.F.R. § 300.453(d). Under the quoted language, a state or school could choose to mandate services to all students who attend private schools.

THE RIGHT TO CONTINUED SERVICES WHEN AN APPEAL IS FILED

Under IDEA, if a an impartial hearing is requested, the student remains in the current educational placement (status quo) until the hearing and any appeals to the state level of review and to court are completed. 20 U.S.C. § 1415(e)(3). What if a parent is only challenging part of the IEP? The new regulations clarify that a school cannot use a parent's refusal to consent to one service or benefit as a basis to deny another service or benefit. 34 C.F.R. § 300.505(e). Therefore, the school should implement agreed upon services pending resolution of a disagreement about other services. See Federal Register, p. 12610, 3/12/99.

What if the parents prevail at the state review level? If the school appeals to court, may it refuse to implement the state's decision based on status quo? In that case, the school must implement the state's decision. The new regulations clarify that if the state rules in the parents' favor, that constitutes an agreement between the parents and state for purposes of status quo. 34 C.F.R. § 300.514(c).

CONCLUSION

Children with disabilities can benefit greatly from assistive technology that is available in educational settings. With the appropriate AT made available to a student, a school district may be able to meet IDEA 97's promise of helping "prepare them for employment and independent living." If that promise is to be met, attorneys and advocates must be vigilant to make sure that the public schools comply with IDEA '97 and the 1999 regulations.

Opinions expressed do not necessarily reflect the position of the U.S. Department of Education and no official endorsement of those opinions by the U.S. Department of Education should be inferred.